Implications of Court of Appeal judgment of *Johnson, Wrench* and *Hopcraft*

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1 Introduction

1.1 Last Friday, 25 October 2024, the Court of Appeal handed down its consolidated judgment in the three motor finance commission cases: *Hopcraft v. Close Brothers* (**Hopcraft**), *Wrench v. Firstrand Bank* (**Wrench**), and *Johnson v. Firstrand Bank and Motonovo Finance* (**Johnson**) (**CoA Ruling**).

1.2 The topic of secret commission arrangements in many consumer purchases has long been an interest of claims management companies and FCA review. It has been a fundamental component of claims relating to the mis-selling of mortgages and/or PPI.

1.3 The CoA Ruling unexpectedly held that motor dealerships, acting in their capacities as credit brokers, owed the following duties to their customers as borrowers:

(a) A duty to provide information, advice or recommendations on an impartial or disinterested basis (the **Disinterested Duty**); and

(b) An ad hoc fiduciary duty "*arising from the nature of the relationship, the tasks with which the brokers were entrusted, and the obligation of loyalty which is inherent in the disinterested duty*".

1.4 Where payment of the commission was secret, this constituted a breach of the Disinterested Duty; in such cases both the credit broker and lender are liable to the customer. The CoA Ruling held that disclosure in the body of T&Cs that a commission ***may*** be paid was insufficient to negate the secrecy of the commission.

1.5 Further, even where the fact of the commission was sufficiently disclosed to negate secrecy, insufficient information had been given to the customers to enable the customer to provide their fully informed consent to receipt of the commission by the credit broker. This constituted a breach of the ad hoc fiduciary duty by the credit broker, and the lender could be liable as an accessory to that breach.

1.6 The CoA Ruling has a seismic impact which is not restricted to discretionary commission models or motor finance arrangements. It goes beyond the type of consumer-litigation cases that have already been issued in the courts or the subject of FCA intervention, and may impact any business which relies upon the use of credit brokering intermediaries to offer finance to personal or business customers.

2 The judgment

The findings

2.1 The CoA Ruling decided that the dealerships, in their capacity as credit brokers, owed both a Disinterested Duty and an ad hoc fiduciary duty to their customers (as borrowers). They were placed in a position of trust and confidence for unsophisticated borrowers to source lenders, and these duties would apply unless it was made clear that they wouldn't.

2.2 The commissions were deemed to be fully secret in Hopcraft and Wrench, and there was therefore a breach of the Disinterested Duty. In these cases, the CoA Ruling held that the lenders were primarily liable as payers of the secret commission. The credit brokers would also be liable to the customer, although they were not defendants in the cases.

2.3 However, in Johnson, it was conceded by the claimant there was sufficient disclosure to negate secrecy of the commission and accordingly there was no breach of the Disinterested Duty. Despite this, the Court found that the dealership (as credit broker) was in breach of its ad hoc fiduciary duty because there was not sufficient disclosure to allow the borrower to

provide informed consent to the dealership's receipt of commission. In particular, the borrower had not been informed of "*all material facts that might have affected his decision to enter into the hire-purchase agreement* […]", and the disclosure hadn't included (amongst others):

(a) The fact that a commission ***would*** be paid (not that it might);

(b) The fact it was paid under an agreement between the credit broker and lender which gave the lender a first right of refusal to lend (versus other lenders on the credit broker's panel); and

(c) The amount of the commission or how it would be calculated.

2.4 Since the dealership (credit broker) was not party to the claim, which was brought against the lender, the Court considered whether the lender could be liable as an accessory to the breach. The Court accepted this could only apply where the lender had acted ***dishonestly*** in paying the commission.

2.5 In this regard, the Court stated as follows (our emphasis):

"*dishonesty, in this context,* ***means knowing*** *about, or* ***deliberately turning a blind eye*** *to, the* ***breach of the broker's fiduciary duty to their principal****. Once it is aware that the dealer is acting as credit broker for the consumer,* ***the lender knows that the broker cannot receive payment of a commission or fee from the lender unless there has been full disclosure and the consumer/borrower has consented****.* ***The lender cannot assume that there has been full disclosure of the commission simply because the lender (or even the regulator) requires the broker to make such disclosure.*** *If the lender does not take it upon itself to give full disclosure to the consumer, it deliberately takes the risk that the broker will not do so, and that is what happened in these cases. That risk was obvious: the brokers plainly had a motive for keeping quiet about the amount of commission, or how it was calculated, particularly if a DIC model was used.*"

2.6 Accordingly, the lender was deemed to be dishonest in payment of the commission to the dealership and was held liable to the customer as an accessory to the credit broker's breach of fiduciary duty.

3 Implications

3.1 The finding of a fiduciary duty owed by credit brokers in these circumstances goes beyond what was previously understood.

3.2 This decision potentially covers all intermediary/broker-lead business/products where commission is paid, including in business to business markets for both regulated and unregulated products. Courts may be less willing to find a fiduciary duty in such circumstances, although this would remain to be tested in future cases. This wider impact is not addressed in the judgment.

3.3 Further, in relation to consumer credit, the required disclosure to ensure there is no breach of fiduciary duty by the intermediary / broker is higher than required by current rules in the FCA's Consumer Credit Sourcebook in the FCA Handbook (**CONC**).CONC 4.5.3R currently requires an intermediary to prominently disclose "*the existence and nature of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party*", but only where the existence or amount of such payments could affect the impartiality of the credit broker in recommending the credit agreement, or where knowledge of it would have a material impact on the customer's decision to enter into the agreement. Accordingly, there may be some circumstances in which no disclosure at all is required by the regulations, and disclosure of the amount of the commission is not required in the first instance.

3.4 However, where there is a fiduciary duty, the CoA Ruling suggests that a credit broker must disclose "*all material facts that might have affected* [the borrower's] *decision to enter into the* [agreement]" to ensure they do not breach this. This could cover a wide range of information.

3.5 In addition, given the potential accessory liability by lenders to a credit broker's breach, the judgment in effect places obligations on the lender to disclose the commission arrangements if the broker has not done so. Indeed, lenders may be reluctant to rely on compliance by a credit broker, and put in place processes to ensure that they themselves are fully disclosing commissions to be paid to credit brokers.

3.6 The CoA Ruling also opens up questions of when a customer may be deemed to provide "*informed consent*" to the commissions.

4 Industry reaction

4.1 Given the unexpected nature of the CoA Ruling and its potential impact, we have seen a range of reactions from the FCA, lenders, brokers, providers of unregulated lending across the motor finance and multiple other sectors.

4.2 Claimants and Potential Claimants

(a) Within hours of the CoA Ruling, claimant litigation firms and claims management companies were claiming a seismic victory for consumers and were heavily promoting their services to recruit more claimants to their respective rosters.

(b) At the moment, the FCA pause only applies to motor finance Discretionary-Interest-Commission arrangements, so any other motor finance commission arrangement will be out of scope of the pause and can be referred to the FOS. It remains to be seen whether affected individuals will opt to pursue their complaint via the DISP rules and refer to FOS, or whether they will be brought as claims in the county court.

(c) Whilst the media (and in particular the Martin Lewis Show) have only referred to the CoA Ruling as opening the doors for more motor-finance complaints, it can be seen on various media outlets that consumers are already asking whether it can be applied to a range of products (for example, but not limited to): pensions advice; mortgage broker arrangements; credit agreements that are entered into for mobile phones; insurance products etc.

4.3 Lenders/ Funders

(a) The instant reaction was to note that the obligations imposed upon lenders and brokers/ intermediaries as a consequence of the CoA Ruling rendered their existing 'customer journeys' and broker arrangements to be 'non-compliant'. It will take time to make improvements and render each stage of the customer journey compliant, but it is not possible for those improvements to have retrospective effect.

(b) The CoA Ruling has therefore considerably expanded the potential litigation landscape and lenders will be assessing the impact upon any earlier provisions made to account for litigation risk. Those assessments will now have to account for a significantly expanded scope for new claims. In addition, larger lenders who offer finance outside of the motor finance market will also be considering the 'contagion risk' and whether there is a likelihood that claims will be brought in respect of those services.

(c) Given the huge uncertainty that has been created without any forewarning, it is reported that multiple lenders have delayed the publication of financial results and/or announced a temporary pause on the availability of lending.

4.4 FCA

(a) The motor finance industry needs access to funds and the anxiety in the market needs to be quelled. Many lenders have already been contacting the FCA to explain their position and put pressure for the FCA to make an announcement.

(b) We understand that it would be lenders' preference that the FCA expand the scope of the pause into complaints in respect of Discretionary-Interest-Commission arrangements in motor finance lending, to apply to all types of commission arrangements in motor finance lending. Given the claimant litigation firms' massive ramp up in activity, that pause may only be a sticking plaster: it is still open for customers to bring claims in the county courts (a route that has already been tried and tested in PPI litigation).

(c) So what is the FCA planning?

(i) On 25 October 2024, the FCA released a short statement that they were carefully considering the CoA Ruling. Further, in a speech to the Investment Association Annual Dinner 29 October 2024, Nikhil Rathi (CEO of the FCA) addressed the CoA Ruling[1].

(ii) What may be deemed reflective of the FCA's apparent surprise at the CoA Ruling, Mr Rathi appeared keen to distance the FCA from the CoA Ruling, noting that it "*was rooted, not in the FCA's rules, but the longstanding common law principle of fiduciary duty*". Mr Rathi also stated that "*First and foremost, we need clarity on whether this is the courts' final word on the issue*" and "*We are working closely with the financial services sector, the Financial Ombudsman Service and the Government to understand any wider consequences and further steps needed.*"

(iii) These latter statements reflect the reactions we have seen amongst lenders in the motor finance space, with some delaying announcements on financial results, and others announcing that they will not be lending. This will clearly have a detrimental impact on the industry in the short term.

(iv) Time is of the essence, and we will be closely monitoring any further announcements released by the FCA. There may be a temporary sigh of relief if the FCA does expand the scope of the pause. It is feasible that the FCA introduces a redress scheme: such schemes were implemented during the PPI litigation as a result of mis-selling and Plevin style commission arrangements, although that did not stop court claim activity.

4.5 Brokers

(a) We expect that many motor finance dealerships (and, indeed lenders) will be immediately turning to their association body, the Finance & Leasing Association (**FLA**), for guidance as to how they can best implement the requirements imposed by the CoA Ruling.

(b) To date, the FLA's briefing on commission disclosure and consent[2], provides some early guidance on what ought to be disclosed and how a lender / credit broker might seek consent from the borrower to payment of a commission. In summary:

(i) Any remuneration connected to the credit agreement, directly or indirectly, should now be disclosed. This includes not only commission, but other forms

[1] FCA statement on Court of Appeal judgment in Hopcraft, Johnson and Wrench | FCA

[2] FLA briefing on commission disclosure and consent

of remuneration such as administration fees, panel fees or any other remuneration that passes from a lender to an intermediary;

(ii) All remuneration paid across the lender-broker-retailer chain should be disclosed to the customer. This could include payments to / from lenders, brokers and retailers;

(iii) The disclosure must be displayed as a single monetary figure, alongside methods of calculation. There should also be itemisation where appropriate;

(iv) If the precise amount to be paid is not known, the method of calculation and reasonable estimate of the likely amount of remuneration should be disclosed;

(v) The disclosure must be made in good time before the signing of the credit agreement, and must be prominent;

(vi) In obtaining consent, it is important that the customer is clear about the commission arrangement.

(c) This is early guidance and is likely to evolve rapidly. Given the size of some motor dealership operations and their sales workforce, it will require significant time and resource to ensure that sales teams (who are credit brokers) fully understand the scale of the changes and are trained and supervised appropriately.

(d) It will also be explored as to whether adopting this approach will be sufficient to avoid being held liable as a fiduciary, or to comply with fiduciary duties. In that regard, given the broad nature of disclosure required to ensure potential fiduciary duties are not breached – "*all material facts* […]" – it is impossible to provide a comprehensive list of items which need to be disclosed in each circumstance.

(e) Further, whilst this is guidance that has been presented by the FLA who has a deep understanding as to how the motor finance industry operates, brokers/ intermediaries who operate in different sectors and with different types of lenders, will have to closely examine their own processes and identify how it can best implement the new requirements.

5 Appeal

5.1 We know that the defendants in these cases were refused permission by the Court of Appeal to appeal to the Supreme Court and will therefore have to issue applications for permission to appeal to the Supreme Court. The deadline for those applications is a matter of weeks. That is a very short window of time, but similarly, any such application will have to be carefully crafted.

5.2 There will be considerable activity in the legal market to assess the prospects of success of any appeal, and there will be underlying concern that the CoA Ruling may not be overruled by the Supreme Court.

5.3 In addition, the defendants (and interested parties) will have to first overcome the test for permission to appeal to be granted. Permission to be appeal is only granted for applications that, in the opinion of the Justices, (1) raise an arguable point of law that is (2) of general public importance.

5.4 As regards the point of law, we consider that any prospective appeal will address some of the following questions:

(a) Is it reasonable to impose a fiduciary duty upon a broker, particularly if it is not being paid by the customer to perform that service? Can a disinterested duty and fiduciary duty co-exist in the same transaction?

    (i) In our view, the Court has failed to adequately describe why such a fiduciary arises and its understanding of the consumer mindset is over simplistic.

(b) Where the FCA has defined the scope of a credit broker's duty in relation to consumer credit, and they have been given power by Parliament to make such rules, can the common law impose more stringent obligations seemingly in contradiction to those rules?

(c) In cases where credit brokers are deemed to be acting as agent for the lender in consumer credit transactions (under the Consumer Credit Act 1974), is it right that they may also be deemed to be acting as agent / fiduciary to the borrower?

    (i) It seems counter-intuitive to impose a duty upon dealerships to act with utmost loyalty to the customer's best interests (as required in a fiduciary relationship) and yet, still deem that same broker to be an agent of the third-party lender.

(d) Is it right that a lender can have accessory liability, and be deemed to have acted dishonestly in making a payment to a credit broker, where they could not have known the credit broker was acting as a fiduciary (until the CoA Ruling) and where regulatory obligations apply to those credit brokers? Is it right that the lender cannot rely on the credit broker to comply with their regulatory obligations?

    (i) The CoA Ruling surmised that the lenders must have known that dealers acting in their capacity as credit brokers were fiduciaries (and that knowledge has retrospective effect) and also effectively assume that the dealerships will breach their obligations.

(e) Does the CoA Ruling undermine the certainty of contract, and the trite law that parties to an agreement are taken to have read it?

(f) What are the scope of the remedies available for the customer if there has been a breach of a Disinterested Duty or fiduciary duty, and where the lender is held liable as either a primary wrongdoer or an accessory?

5.5 Whilst those are just some of the available grounds of law to be challenged, and please bear in mind that Justices prefer for any applications to the Supreme Court to be concise and not exceed 10 pages, the application will also have to deal with the 'public interest' element of the request for permission.

5.6 In section 4 above, we have explored the impact upon various different groups and parties, which demonstrates the extent of the 'public interest' in this CoA Ruling.

(a) In our view, whilst it is rare for non-parties to a claim to apply for permission to appeal to the Supreme Court, it is possible for this to happen if there is a significant interest in the case. These interests must be compelling enough to justify the non-party's involvement in the appeal process. For example (but not limited to) if the outcome of the CoA Ruling will have a significant impact upon financial interests and contractual relationships, and/or there is significant public interest.

(b) Typically in cases that have a significant public interest (which is evident from the extensive reports in mainstream media), advocacy groups or trade associations may seek to appeal to ensure that broader industry interests are considered.

(c) The Court will consider multiple factors when assessing a non-party's interest, including:

(i) The potential impact of the case upon the public.

(ii) Does the non-party have sufficient expertise and authority to participate and advocate a wider interest?

(iii) Does the party have a solid legal and factual basis for their interest in the case?

(iv) Can their interest be balanced against the original parties to the case?

(d) We anticipate that larger lenders and dealerships will be exploring these options, to ensure that their voice can be heard in a court decision that has massive impact upon their business. Whether they explore those options on an individual basis, or use the trade associations (such as the FLA) to pursue that interest on their behalf, remains to be seen. It may be the case that smaller dealers and lenders will be pressing the FLA to act on their behalf, as they may lack the immediate legal and financial resource to pursue their own application within the short time available.

(e) In this note we have also discussed that the ruling is being objectively construed as potentially being applicable to non-motor finance lending and unregulated lending, which may have been outside the original consideration of the CoA Ruling. If other sectors wish to make their voice heard, they may be consulting with their own industry bodies for further assistance.

5.7 If permission to appeal is granted, it can then be further considered as to whether 'interested parties' may want to participate in that appeal process.

6 What next?

6.1 It is anticipated that the outcome of the CoA Ruling will receive permission to appeal to the Supreme Court, the ramifications of the CoA Ruling must be dealt with in the interim:

(a) Lenders and brokers will be under huge pressure to examine their 'customer journey' to examine how it will need to be overhauled to improve transparency and commission arrangements.

(b) Lenders and brokers will need to consider how they work together to ensure compliance with the new requirements.

(c) Terms and conditions, pre-contractual information, key information documents etc will need to be reviewed and examined to ensure that they sufficiently disclose the commission payment.

6.2 It is appreciated that these fixes are not quick or easy to implement and may require a root and branch review of all aspects and forms of customer communication. Any such improvement or fix can also only have a 'go forward' improvement and cannot have a retrospective impact. We therefore anticipate that there will be pressure placed upon the FCA to either clarify the impact of the CoA Ruling or issue a notice in the market to quell the expected activity that will include a combination of a rise in court claim activity and conjunctive efforts to implement any necessary changes to process.

6.3 Notwithstanding any announcements from the FCA, the claims management companies and litigation firms will be emboldened by this decision. Many banks and lenders are already experienced in the handling of mass-claims, but this could be a new experience for smaller

lenders or other firms that do not operate in the motor-finance sector. The merits of each case will need to be examined on a case-by-case basis. There are still some defences available: limitation; sophistication of the claimant; the extent of any prior disclosure of commission arrangements; how the broker was remunerated etc.

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